

02-955

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KD GRAPHICS, INC. and JEFFREY KWAIT	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO. 02-4041
v.	:	
	:	
TROPICAL GRAPHICS, INC. and PAUL HIRST	:	
Defendants.	:	

ORDER

ANDAND NOW, this day of AND NOW, this day of AND NOW, this day of

SummarySummary Judgment and Defendants Response thereto, it is hereby ORDERED that Plaintiffs

Motion for Summary Judgment on Defendants Counterclaims is DENIED in its entirety.

BY THE COURT:

J.

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From the beginning of the relationship it was apparent that Kwait was unable to operate the sublimation printer, or otherwise was careless and negligent in doing so. In August, 2001, Tropical offered KD a technical support services contract for the maintenance of the sublimation printer, but Kwait and KD refused to purchase it. Despite refusing to pay for the contract, Kwait refused to pay for the contract.

Kwait admitted to Tropical that, on multiple occasions, he allowed ink to lay in the printer for lengthy periods of time. Indeed, in the early 1990s, Tropical suffered a down turn and that he had left the printer idle with ink in it for over a year. Tropical responded that this practice can damage the printer and sent Kwait a flushing kit on no charge to help foster good will. Kwait also tried to replace the printer against the advice of Tropical, which had recommended that he continue to use the work. From August, 2001 to the beginning of April, 2002, Kwait and KD never complained to Tropical about the Artainium ink. To the contrary Kwait and KD continued to place orders. Tropical continued to work with Kwait and KD despite their orders. They ordered. Only after Tropical notified Kwait and KD that they had ordered additional ink unless they paid their outstanding debt, did Kwait stop ordering ink. Kwait continued to have problems with the printer on the Artainium ink.

Thereafter, Kwait's unreasonable conduct escalated. Tropical threatened to disparage the good name and reputation of the company, produce a press release, and sue the company's President, Paul Hirst. Further, for a period of time, Tropical's fax machine was flooded with hundreds of thousands of blank faxes. Tropical stated that Kwait sent these faxes. As a result of using that Kwait's product orders, business and sustained damage to its customer relationships.

Plaintiff is not entitled to Summary Judgment on Defendants' claims for intentional interference with business relationships, claims for interference with business relationships, claims for quantum meruit for technical support provided to KD, and Defendants' claim to pierce the corporate veil and find against Jeffrey Kwait personally, corporate veil and find against Jeffrey Kwait personally exist for each claim identified in Plaintiffs' Motion. Plaintiffs' contention that no genuine issues of material fact pertain to these claims which would support their motion.

II. ARGUMENT:

A. Standard:

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted where all of the evidence of material fact and that the moving party is entitled to judgment as a matter of law. If an issue of fact is present, precluding summary judgment, when all evidence, could rationally find in favor of the non-moving party in all evidence, could rationally be placed on the non-mover. Gilbert v. The Bionetics Corporation, 2000 WL807015 (6th Circuit 1994). All inferences must be viewed in a light most favorable to the non-moving party, and facts asserted by the non-moving party, and facts asserted by the non-moving party, must be regarded as true. Gilbert, 2000 WL807015 at *2.

B. Defendants should be allowed to establish potential interference with Defendants relations at the time of trial because genuine issues of material fact exist.

An essential element of intentional interference with a contract is the plaintiff's showing of an intentional and unjustified interference by the Defendant. *See C.D. Peacock, Inc. v. The Neiman Marcus Group, Inc.*, 1998 WL 111738 (E.D. Pa. 1998).

Defendants (Counterclaim Plaintiffs) assert that for Defendants (Counterclaim Plaintiffs) assert that for June 27, 2002, Tropical's fax machine became flooded with June 27, 2002, Tropical's fax machine became Declaration, paragraph 1, attached as Exhibit 1). As a Declaration, paragraph 1, attached as Exhibit Tropical's fax machine was unable to receive orders for services Tropical's business orders during this time period. (See Exhibit 1, paragraph 2). Defendants believe that these blank faxes were sent by KD, its employees, or Kwait. (See Exhibit 1, paragraph 3).

In order to rebut Defendants' contention that all telephones at KD Graphics. (See Exhibit 1, paragraph 3). Although admittedly on Defendants' Counterclaims). Although admittedly fax number or the regular voice telephax number or the regular voice telephone fax number or the regular faxes could well have been sent from another location by faxes could well have been sent from another location are aware, the depositions of Defendants and Plaintiffs are aware allowed to gather evidence in support of their claim allowed to gather evidence in support of the Plaintiffs' request for summary judgment on the Plaintiffs' request for summary judgment on the above actions, which creates an issue of fact for an trial. Therefore, a general issue of material fact exists. Therefore, a general issue of material fact exists summary judgment on Defendants' claim of intentional interference with business relations.

C. Defendant should be allowed to pierce the corporate veil where a material fact exists as to whether Kwait's interference with Tropical's business is illegitimate.

Although the general rule is that a shareholder is not personally liable for the obligations of the corporation, the corporate veil will be pierced when the corporation was used for illegitimate purposes and abuse of the corporate fiction. *Wheeling-Pittsburgh Steel Corp. v. International Union of Steelworkers*, 1919 F.3d, 1503 (3rd Cir. 1994) *citing* Wheeling-Pittsburgh Steel Corp. v. Int'l Union of Steelworkers, 1919 F.3d, 1503 (3rd Cir. 1994).

Supp. 1054, 1058 (W.D. Pa. 1990). In deciding whether to pierce the corporate veil, the court's basic concerns are determining if equity requires that the shareholder's traditional insulation from personal liability be disregarded and ascertaining if the corporate form is a sham, a mere facade for the operations of the dominant shareholder. Steel Corp. v. Intersteel, Inc., 758 F. Supp. 1054, 1058 (W.D. Pa. 1990).

The alter ego concept is a tool of equity that is appropriately utilized to prevent fraud, prevent fraud, illegality or injustice or when the recognition of the corporate entity would be against public policy or shield someone from public liability for a crime. K event that permits the corporate veil to be pierced is the fact that the event that permits the corporate veil to be pierced is for the operations of the dominant stock holder or stock holders. Id., at 1521.

KD Graphics has only three shareholders as stated in KD Graphics' Request for Admissions, President Jeffrey Kwait, Christy Kwait, and Ladina Kwait. (See Plaintiffs' Answers to Defendants' Request for Admissions). Therefore, KD operates merely as a facade for the operations of the Ladin Kwait as dominant stockholders and the only stockholders. Furthermore, Jeffrey is using the corporation fiction for the illegitimate purpose of interfering with Tropical by bombarding Tropical with blank fax orders in order to interfere with Tropical's mechanisms. (See Exhibit 1, paragraph 3). Kwait, as President of KD, in a conversation with Defendant Hirst on June 17, 2002, also threatened to defame Tropical at conventions. (See Exhibit 1, paragraph 4).

As stated above, the depositions of Jeffrey Kwait and Christy Kwait remain outstanding, as well as the depositions of Defendants' employees, Simon Wells and Paul Hirst. Plaintiffs' Motion for Summary Judgment on Defendants' claim to pierce the corporate veil.

substantial discovery remains outstanding. Likewise, as stated above, a closely held corporation and a material issue of fact exists as to whether it is merely a sham in order to cover Kwai's illegitimate purposes in harming Tropical's business. Motion for Summary Judgment should be dismissed in its entirety.

D. Defendant Defendants have shown an implied contract and unjust enrichment support provided to KD Graphics and, therefore, support provided to KD Graphics and to preclude summary judgment.

Defendants Counterclaim, Count II asserts Defendants Counterclaim, Count II asserts implied unjust enrichment/quantum meruit as a cause of action. Count II of Defendants Counterclaim asserts that KD failed to pay Tropical for a graphics project in addition to support services that Tropical provided KD for advice and technical support. (See Defendants Answer, Affirmative Defenses and First Amended Complaint, Count II).

To the contrary of Plaintiffs contentions in their Motion for summary judgment, Tropical agreed to and undertook to produce the graphics projects as requested and provide technical support and advice to KD. (See Exhibit 1, paragraph 5; see also the Declaration of Mario Carangelo, at paragraph 2, attached as Exhibit 3). KD was aware of and accepted Tropical's support contract for its technical services and advice and availed itself of those services. (See Exhibit 1, paragraph 6, and Exhibit 3, paragraph 2).

Count III of Defendants Counterclaim asserts that Tropical is entitled to quantum meruit recovery for failing to pay for, Tropical's services in providing graphics products on and off the record for technical services and advice. (See Defendants Answer, Affirmative Defenses and First Amended Counterclaim to Plaintiffs Amended Complaint, Count III). Count III of Tropical's Amended Complaint asserts that Tropical is entitled to quantum meruit recovery for failing to pay for, Tropical's services in providing graphics products on and off the record for technical services and advice. (See Defendants Answer, Affirmative Defenses and First Amended Counterclaim to Plaintiffs Amended Complaint, Count III).

technical support services from Tropical and that KD never paid for such services. (See Defendants Answer, Affirmative) stated above, Tropical produced graphic projects at the request of KD and provided technical support. (See Exhibit 1 and Exhibit 3). In addition, person, Mario Carangelo spent twelve hours working with KD on technical support for which he bills \$75.00 per hour. (See Declaration of Mario Carangelo, Exhibits 2 and 3). Also, Paul Hirst, President of Tropical spent five (5) hours. (See Exhibit 1, paragraph 5). Mr. Hirst's billing rate for technical service and support is \$75.00 per hour. (See Exhibit 1, paragraph 7). To date, although demand has been made, KD has not paid for Tropical's technical support and services. (See Exhibit 1, paragraph 8).

As the above indicates, Defendants have established sufficient evidence to support their claim of an implied contract, and unjust enrichment/quantum meruit in order to grant Summary Judgment. Therefore, as genuine issues of material fact exist, Summary Judgment should be denied.

III. CONCLUSION:

Based on the foregoing, Defendants assert that genuine issues of material fact which would preclude granting Plaintiffs Motion for Summary Judgment. Therefore, request that this Honorable Court deny Plaintiffs Motion for Summary Judgment and enter the proposed Order attached hereto.

Respectfully submitted,

REGER & RIZZO, LLP

By:

Jason J. Sweet, Esquire
Attorney for Defendants

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CERTIFICATE OF SERVICE

I, JASON I, JASON J. SWEET, ESQUIRE, hereby certify that I served a true and correct copy of Defendants Defendants Memorandum in Opposition to Plaintiffs Motion for Summary Judgment on Defendants Defendants Counterclaims on the following by mailing same, first class, pDefendants Counter December 13, 2002:

Andrew Lapat, Esquire
STEIN AND SILVERMAN, P.C.
230 South Broad Street, 18th Floor
Philadelphia, Pa 19102

By: _____
Jason J. Sweet, Esquire